In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 735

W. RALPH DAVIS, FRANK A. LEAMY, AND MARGARET M. BOOTHE, INDIVIDUALLY AND AS OFFICERS OF BELLE HAVEN CITIZENS' ASSOCIATION, A CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 228 F. 2d 280 (Pet. App. 13–18). The district court did not write an opinion. Its findings of fact and conclusions of law appear at Pet. App. 22–36.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1955 (Pet. App. 19). Petition for a writ of certiorari was filed on March 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in this proceeding by the United States to condemn a small existing sewer system in connection with an extensive sewer construction project designed to safeguard health in a large defense housing area, the court of appeals correctly held that the taking was authorized, notwithstanding the fact that the President's approval of the over-all sewer project, entered pursuant to the Lanham Act, did not expressly refer to the small existing system.

2. Whether the taking of the existing sewer system, which was integrated with the larger system and sold with that system to the county as prescribed by the Lanham Act, was a taking for a public use.

STATUTES INVOLVED

The material portions of the Act of June 28, 1941, 55 Stat. 361, 42 U. S. C. 1531, 1532, amending the Lanham Act of October 14, 1940, 54 Stat. 1125, are as follows:

> SEC. 201. It is hereby declared to be the policy of this title to provide means by which public works may be acquired, maintained, and operated in the areas described in section 202. As used in this title, the term "public work" means any facility necessary for carrying on community life substantially expanded by the national-defense program, but the activities authorized under this title shall be devoted pri-

marily to schools, waterworks, sewers, sewage, garbage and refuse disposal facilities, public sanitary facilities, works for the treatment and purification of water, hospitals and other places for the care of the sick, recreational facilities, and streets and access roads.

SEC. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage—

(a) To acquire, * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works.

(b) By contract or otherwise * * * to plan, design, construct, remodel, extend, repair, or lease public works, and to demolish structures, buildings, and improvements, on lands or interests in lands acquired under the provisions of subsection (a)

hereof or on other lands of the United States which may be available (transfers of which for this purpose by the Federal agency having jurisdiction thereof are hereby authorized notwithstanding any other provisions of law), provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, and machinery, and do all things in connection therewith to carry out the purposes of this title.

SEC. 203. (a) In carrying out this title—

(1) no contract on a cost plus a percentage of cost basis shall be made, but contracts may be made on a cost plus a fixed fee basis: *Provided,* That the fixed fee does not exceed 6 per centum of the estimated cost;

(2) wherever practicable, utilization shall be made of existing private and public facilities or such facilities shall be extended, enlarged, or equipped in lieu of constructing new facilities;

(3) public works shall be maintained and operated by officers and employees of the United States only if and to the extent that local public and private agencies are, in the opinion of the Administrator, unable or unwilling to maintain or operate such public works adequately with their own personnel and under loans or grants authorized by this title;

* * * * *

The material portions of the Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U. S. C. 1534 (note), amending the Lanham Act, are printed at pages 3–4 of the Petition.

STATEMENT

During World War II, the Federal Works Agency found it necessary to install an extensive sewerage system for defense housing in Fairfax County, Virginia, and to utilize some existing, privately-owned sewer pipes as a part of the trunk line of that project. Accordingly, the United States instituted this condemnation suit on December 13, 1944, and filed a declaration of taking to acquire a permanent easement for the construction and operation of sewer-pipe lines in the land occupied by some of the sewer pipes of the Belle Haven Realty Corporation in the real estate subdivision of Belle Haven. Possession was taken under court order, Belle Haven's outfalls into Hunting Creek and the Potomac River blocked off, and its sewage diverted into the Government's trunk line system.[1]

[1] One part of the planned trunk sewer used part of the Belle Haven system (to effect the economy of avoiding duplication at a specific place and grade) and another part crossed Belle Haven's outfall lines at approximately their grades. The latter necessitated blocking off Belle Haven's outfalls and leading Belle Haven's sewage into the trunk line. Moreover, it was desired to replace Belle Haven's outfalls into the sluggish waters of Hunting Creek and at the bank of the Potomac River with the federal outfall into the flow of the Potomac 700 feet from shore.

On April 8, 1948, by amendments to the petition and declaration of taking, the scope of the taking was enlarged to include easements in additional lands in the subdivision and also title to all sewer mains previously constructed by the corporation in the area. This taking, as before, was under authority of Section 202 of the Act of June 28, 1941, 55 Stat. 361, 42 U. S. C. 1532, amending the Lanham Act of October 14, 1940, 54 Stat. 1125, *supra*, pp. 3–4.

The existing system was then fully integrated with the trunk system. Previously, in 1944, the Government had leased the trunk system, which it constructed, to the Board of Supervisors of Fairfax County, granting permission to make reasonable charges for the services. By supplemental lease in 1949, the Belle Haven system was added to the property covered by the lease and, subsequently, the entire system was sold to the County Board. The County billed the residents of Belle Haven an amount uniform with the service charge to all other users of the system (Pet. App. 23).

On November 4, 1948, the district court granted an application by petitioners, residents of Belle Haven, to intervene as holders of implied easements in the original system.[2] 89 F. Supp. 571. Thereafter, petitioners filed an amended answer

[2] The Belle Haven Realty Corporation owned the sewers. The cost of constructing the Belle Haven system had been reflected in the purchase price of each lot.

denying the Government's authority to condemn and asking restoration and return of the sewer system in its original condition. The district court decided the issue in petitioners' favor. 101 F. Supp. 172. It set aside the declaration of taking and dismissed the condemnation proceeding on the ground that the amendment to the Lanham Act of July 15, 1943, 57 Stat. 565, 42 U. S. C. 1534 (note), (Pet. 3–4), requires consent of the owners and that there was only qualified consent from the owner, Belle Haven Corporation, and none at all from the users of the system. The court of appeals affirmed (196 F. 2d 657), but this Court reversed that ruling. 345 U. S. 344.

On remand, the district court set down for trial four issues. 121 F. Supp. 268. They were (1) whether the taking was for a public purpose; (2) whether the President approved this project as required by the Lanham Act; (3) whether funds were allotted for "substantial additions or improvements" to the Belle Haven system, as required by the 1943 amendment; and (4) whether the Belle Haven Corporation gave its consent to the acquisition. Following a trial, the court entered findings and conclusions in favor of the Government on all issues except Presidential approval (Pet. App. 22–36). As to that issue, it found that there was no approval (Pet. App. 24–31). The basis for the court's holding was that, in approving the county-wide project, the President did not name the Belle Haven sys-

tem and that, in executing the project, more money was expended than was specified in the "estimated cost" stated by the President, and certain pumping stations and a treatment plant, set forth in plans submitted to the President, were eliminated in favor of a gravity line emptying into the flow of the Potomac River. Accordingly, the district court again dismissed the proceedings (Pet. App. 36).

On appeal by the United States, the court of appeals reversed (Pet. App. 13–21). It held that Congress did not intend that the President "should pass upon the details of such projects, or that the details of construction or acquisition should be frozen by his certificate of approval or that it would be necessary to run back to him for permission when any changes were made therein" (Pet. App. 17). The court of appeals agreed with the district court's determination of the other issues decided by it and remanded the case for further proceedings, *i. e.*, for determination of compensation (Pet. App. 18).

ARGUMENT

1. Petitioners urge that the President did not approve the taking of the Belle Haven system because "this specific project" was not named in his letter of approval. They seek to buttress this contention by pointing out that more money was expended on the Fairfax County project than was stated in the original estimate of cost.

The President's determination was that there was an "acute shortage" of safe sewer facilities "in the area or locality in and about" Fairfax County and that this situation should be remedied. There is no question, of course, that the Belle Haven system was in the geographical area described and that it falls within the general scope of the Presidential determination.[8] As the court of appeals observed (Pet. App. 17), "[t]he sewer system in main outline was built as planned to furnish sewerage for the housing of defense workers in Fairfax County. The acquisition of the Belle Haven system was but an incident in the carrying out of that plan."

The approval requirement in the Lanham Act (*supra*, pp. 3–4) certainly should not be read to require minute Presidential examination of all constituent elements involved in each of the numerous plans and projects encompassed by a $530,000,000 program. 42 U. S. C. 1534. In view of the many duties of the President, especially in times of a war emergency, Congress obviously intended that his approval relate only to the general project and to the general purpose sought to be

[8] The taking of the Belle Haven system is not to be considered as a separate, isolated transaction. It is but one phase of a comprehensive project for the entire county and must be so approached. *Berman* v. *Parker*, 348 U. S. 26; *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546, 552. The Lanham Act speaks in terms of "the taxing or borrowing authority in which such shortage exists" (*supra*, p. 3), which here is Fairfax County, not just Belle Haven.

accomplished. The Congressional debates show that the reason for requiring Presidential approval was to reconcile the interests of different agencies of the Government. Thus, Senator Taft said (87 Cong. Rec. 5093): "I think this is a desirable provision. It means that if the Office of Education or the Public Health Service or the Army engineers question Mr. Carmody's [the Federal Works Administrator] judgment, they can in effect appeal to the President; and I think that is a very wise provision. *As a matter of fact, the President's approval in most cases will be merely a matter of form.*"[4] [Emphasis added.]

Estimated costs might well provide a persuasive indication in a particular case, especially if the case were otherwise doubtful, as to whether certain actions taken by subordinate officials were within the scope of Presidential approval. This case is not doubtful. And, in any event, the fact that the ultimate cost of the Fairfax project exceeded, by almost eighty percent, the original estimate is wholly without significance since the difference is attributable not to changes in the nature of the project or plan but to a rise in the cost of labor and materials (U. S. Ex. 42). As the court of appeals pointed out (Pet. App. 17), acquisition and integration of the existing

[4] The Public Health Service and the Surgeon General agreed with the Federal Works Agency as to the desirability of this project (Pet. App. 26).

Belle Haven system effected a cost saving, not a cost increase.[5]

Petitioner asserts a conflict with *Puerto Rico Ry. Light & Power Co.* v. *United States,* 131 F. 2d 491 (C. A. 1), and *Wildermuth* v. *United States,* 195 F. 2d 18 (C. A. 7), cases in which the courts found fatal variance between projects as originally authorized and as later implemented. But the court below did not reject the principle of those cases; it affirmed and applied it, concluding that here the challenged acquisition was "but an incident in the carrying out of [the approved] plan" (Pet. App. 17).

2. Petitioners assert that the taking of the Belle Haven system was unjustified from an engineering standpoint, and that neither the Belle Haven system, nor the Fairfax system into which it was integrated, was benefited. On this basis it urges that the taking was not for a public use. The district court, referring to the criteria enunciated by this Court in *Berman* v. *Parker,* 348 U. S. 26, held that the facts "require[d] the finding that the taking of the Belle Haven sewer system was for a public use" (Pet. App. 24). The court of appeals similarly found no basis for disagreeing with the conclusion of the responsible federal authorities that the taking was neces-

[5] We note, incidentally, that the President had been advised that the original cost estimates were not definitive (Pet. App. 25).

sary or desirable "from the standpoint of health or efficiency in furnishing sewerage for the housing of defense workers" (Pet. App. 18). Since the two lower federal courts are in agreement that the facts are sufficient to show a taking for a public use, there appears to be no occasion whatever for a third review of the record by this Court. Cf. *Comstock* v. *Group of Investors*, 335 U. S. 211, 230.[6]

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[6] The suggestion is made that a federal public use was not served because the federally constructed and acquired sewers, including Belle Haven, were sold to Fairfax County (Pet. 5, 9–12). The fact "that the land taken from appellee is to be sold or leased to others does not of itself invalidate the taking, for the government may so proceed in pursuit of its legitimate purposes." *United States* v. *Marin*, 136 F. 2d 388, 389 (C. A. 9); *Berman* v. *Parker*, 348 U. S. 26; *United States* v. *243.22 Acres of Land in Babylon, N. Y.*, 129 F. 2d 678, 683 (C. A. 2), certiorari denied *sub nom. Lambert, Executrix*, v. *United States*, 317 U. S. 698; *United States* v. *Certain Interests in Land*, 58 F. Supp. 739 (E. D. Ill.); cf. *Brown* v. *United States*, 263 U. S. 78, 82. The decisions in *Kohl* v. *United States*, 91 U. S. 367, and *United States* v. *Carmack*, 329 U. S. 230 (Pet. 10–11), are not to the contrary. Moreover, this procedure was expressly authorized by Congress. The United States was cooperating with Fairfax County at whose request this project was undertaken. The Lanham Act contemplated such cooperation, envisaged use of local facilities so far as possible, and provided that the public works should be locally operated if possible (Sec. 203, *supra*, p. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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